SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 15, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Moskowitz, Richter, Kapnick, JJ.

12603-
12604 Index 652429/11

Rita Cusimano, et al.,
Plaintiffs-Appellants,

-against-

Andrew V. Schnurr, CPA, et al.,
Defendants-Respondents,

Bernard V. Strianese, et al.,
Third-Party Intervenors-Respondents.

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Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for appellants.

Garvey Schubert Barer, New York (Alan A. Heller of counsel), for Andrew V. Schnurr, Michael Gerard Norman, CPA, P.C., and Bernard V. Strianese, respondents.

Joseph & Terracciano, LLP, Syosset (Peter J. Terracciano of counsel), for Bernadette Strianese, respondent.

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Upon remittitur from the Court of Appeals for further proceedings (26 NY3d 391 [2015]), judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 11, 2013, which, to the extent appealed from as limited by the briefs, permanently stayed the arbitration of all claims as against

defendant Schnurr, and permanently stayed the arbitration of certain claims as against the Norman defendants and intervenors, unanimously modified, on the law, to vacate the stay of arbitration with respect to the breach of fiduciary duty claims and aiding and abetting breach of fiduciary duty claims as against the Norman defendants and intervenors that fall within the six-year statute of limitations, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 16, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The factual background and procedural history of this longstanding controversy is set forth in the prior decisions (26 NY3d 391 [2015]; 120 AD3d 142 [1st Dept 2014]; 40 Misc 3d 1208[A], 2013 NY Slip Op 51077[U] [Sup Ct, NY County 2013]). As a brief summary, this case involves a series of disputes among family members who own a group of real estate businesses. Plaintiffs Rita Cusimano and Dominic J. Cusimano are husband and wife, and intervenors Bernard V. Strianese and Bernadette Strianese are Rita's father and sister respectively. Rita and the Strianeses own or formerly owned, in various degrees, certain entities that invest in commercial real estate. Defendants Andrew V. Schnurr, CPA and Michael Gerard Norman, CPA are certified

public accountants who, along with Michael Gerard Norman, CPA, P.C., Norman's accounting firm (collectively, the accountants), are alleged to have provided accounting and tax services to plaintiffs and the various entities. The first entity is the Strianese Family Limited Partnership (FLIP), which had owned commercial property in Deer Park, New York, and now owns commercial property in Florida leased to a CVS Drug Store. The second entity is Berita Realty, LLC (Berita), which owns an interest in an entity that owns a Marriott Hotel in New York State. The third consists of two entities known collectively as the Seaview Corporations (Seaview), which own two commercial buildings in New York State.

In September 2011, plaintiffs commenced this action against the accountants alleging breach of fiduciary duty, accounting malpractice, and aiding and abetting fraud and other misconduct on the part of Bernard and Bernadette, who were not named as defendants.

In September 2012, plaintiffs filed a demand for arbitration and a statement of claim, containing nearly identical allegations and including Bernard and Bernadette as respondents. Plaintiffs then moved to dismiss the action they commenced in Supreme Court, or in the alternative, for a stay pending arbitration. The

accountants cross-moved to dismiss the action with prejudice or, in the alternative, to permanently stay the arbitration claims as time-barred. By separate motions, Bernard and Bernadette each moved to intervene and to permanently stay the arbitration based on the statute of limitations. The motion court found many of plaintiffs' claims time-barred, and granted a permanent stay of the arbitration of those claims.

In our previous decision, we did not reach the statute of limitations issue because we determined that was for the arbitrator to decide. The Court of Appeals held that in this case, the issue of timeliness should be determined by the court. The Court of Appeals remitted the case to this Court for further proceedings, and upon remittitur, we now address the statute of limitations issues.

Plaintiffs do not dispute that Schnurr ceased acting as their accountant or doing any other work for them or their companies in 2003. Thus, the motion court properly concluded all of their claims against him are barred as untimely.

Contrary to the motion court's conclusion, we find that a six-year statute of limitations applies to the breach of fiduciary duty claims against Bernard, Bernadette, and the Norman defendants (and to the aiding and abetting breach of fiduciary

duty against the Norman defendants). In *Kaufman v Cohen* (307 AD2d 113, 118 [1st Dept 2003]), this Court explained that the applicable statute of limitations for breach of fiduciary duty depends upon the substantive remedy sought. Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies, but if the claim is for monetary relief, a three-year limitations applies (*see Kaufman* at 118).

"Nevertheless, . . . a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" (*id.* at 119, citing *Goldberg v Schuman*, 289 AD2d 8 [1st Dept 2001]; *Matter of Kaszirer v Kaszirer*, 286 AD2d 598, 598-599 [1st Dept 2001]; *Heffernan v Marine Midland Bank,* 283 AD2d 337, 338 [1st Dept 2001]; *Unibell Anesthesia v Guardian Life Ins. Co. Of Am.*, 239 AD2d 248 [1st Dept 1997]). An exception to this rule exists "'if the fraud allegation is only incidental to the claim asserted'" (*Kaufman* at 119, quoting *Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120 [1st Dept 1985], *affd* 67 NY2d 981 [1986]). Thus, "where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name" (*Kaufman* at 119 [internal

quotation marks omitted]).

Here, although the fiduciary duty claims seek monetary relief, the six-year limitations period applies because the claims sound in fraud. Plaintiffs alleged that the accountants and Bernard and Bernadette induced Rita to sell her stake in Seaview below the fair market value of the interest. Plaintiffs also alleged that with regard to Berita, the accountants and Bernard and Bernadette conspired to falsify tax filings so that plaintiffs incurred phantom taxes and the inability to claim losses in some years. In addition, plaintiffs alleged the accountants and Bernard and Bernadette created fraudulent promissory notes that appear to have gutted Berita of its equity. Further, plaintiffs alleged with regard to FLIP, the accountants and Bernard and Bernadette engaged in similar acts of tax fraud resulting in similar consequences for plaintiffs. Plaintiffs also alleged that the accountants and Bernard and Bernadette forged Rita Cusimano's signature of checks and bank documents to move funds out of the companies.

These allegations, which sound in fraud, are not merely incidental to the breach of fiduciary duty claims, and thus, the applicable limitations period for plaintiffs' breach of fiduciary claims is six years (*see Kaufman* at 119-121; *see e.g. AQ Asset*

Mgt., LLC v Levine, 119 AD3d 457 [1st Dept 2014] [claims that defendant deceived sellers into signing the stock and sales proceeds distribution, and failing to disclose and misrepresenting full benefits accruing to defendant, including defendant's personal interest in the sale proceeds, were sufficient to allege fraudulent conduct that defendant breached his fiduciary duty as to warrant a six-year limitations period]; *New York State Workers' Compensation Bd. v Consolidated Risk Servs., Inc.*, 125 AD3d 1250 [3d Dept 2015] [breach of fiduciary duty claim is subject to a six-year limitations period despite not seeking equitable relief, because defendants breached their fiduciary duties to the trusts by fraudulently concealing or misrepresenting the financial condition of the trusts]; *Monaghan v Ford Motor Co.*, 71 AD3d 848 [2d Dept 2010] [breach of fiduciary cause of action against defendant stated an actual claim of fraud, which was not merely incidental to the breach of fiduciary duty claim and was subject to six-year statute of limitations]; *Klein v Gutman*, 12 AD3d 417 [2d Dept 2004] [cause of action alleging breach of fiduciary duty was based on allegations of actual fraud, and the applicable statute of limitations was six years]).

We reject plaintiffs' claim that the statute of limitations

should be tolled by the open repudiation doctrine, which only applies to claims for accounting or equitable relief (*see Stern v Barney*, 129 AD3d 619 [1st Dept 2015]; *Ingham v Thompson*, 88 AD3d 607, 608 [1st Dept 2011]). Here, plaintiffs seek money damages for their breach of fiduciary claims, and thus this rule is inapplicable.

Plaintiffs' argument that their accounting malpractice claims against the Norman defendants are tolled because of the continuous representation doctrine also is unavailing. Plaintiffs' allegations that the Norman defendants continued to provide accounting and tax services for the relevant entities and individuals amount to nothing more than a series of discrete and severable transactions, and are not sufficient enough to toll the running of the statute of limitations (*see Booth v Kriegal*, 36 AD3d 312 [1st Dept 2006]; *see also Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1 [2007]).

Moving to the fraud claims against the accountants, the motion court correctly applied a six-year statute of limitations. The statute of limitations for claims based on fraud is the greater of six years from the date the cause of action accrued or two years from the time plaintiff discovers the fraud, or could with reasonable diligence have discovered it (CPLR 213(8)). A

plaintiff will be held to have discovered the fraud, when the plaintiff has knowledge of facts from which the fraud could be reasonably inferred (*see Kaufman* at 123, citing *Ghandour v Shearson Lehman Bros.*, 213 AD2d 305, 305-306 [1st Dept 1995], *lv denied* 86 NY2d 710 [1995]; CPLR 203(g); *see also Bezoza v Bezoza*, 83 AD3d 578 [1st Dept 2011]).

Plaintiffs were on inquiry notice long before July 2010 of the alleged fraud committed with respect to all of the partnerships and investments. Rita had signed a promissory note in 1999 promising that Berita would pay Bernard in the amount of $485,426 with 10% interest. Despite her claims that the note was "fictitious" and lacked consideration, she fails to dispute the documentary evidence showing that Bernard injected over $5 million into Berita in the forms of loans, and fails to offer proof of how Berita was funded. This promissory note establishes plaintiffs were on inquiry notice that Berita was paying money to Bernard.

Further, plaintiffs were on inquiry notice because Rita admitted she received from Schnurr a 1998 Schedule K-1 for Berita, reflecting a $890,000 distribution from a Berita entity as though it was paid on a 50/50 basis to plaintiff Rita and Bernadette, but claims she never received the $445,000. Rita's

tax returns for 1998 through 2001 reported income from Berita totaling over $450,000, which she claims she never actually received. Rita admits she readily accepted the explanations provided to her and never questioned what happened to the company's substantial earnings.

Moreover, plaintiffs were on inquiry notice because Rita admits that prior to this current dispute, she had asked for information regarding Berita and other entities in which she had an interest, but that the accountants directed her to her father, Bernard. Bernard assured her that he was looking out for Rita's and Bernadette's interest, and that he "was often annoyed that I would ask about these matters." Rita admitted she wanted more information about the family businesses, but did nothing.

Regarding the fraud claims against Bernard and Bernadette, the motion court was correct in applying a six-year statute of limitations. Plaintiffs admit they had actual knowledge of fraud no later than July 2010, which was more than two years from the commencement of the arbitration, and therefore the two-year discovery rule was inapplicable.

We also agree with the motion court in refusing to apply equitable estoppel to toll the statute of limitations for plaintiffs' fraud claims. Where the same alleged wrongdoing that

underlines the plaintiffs' equitable estoppel argument is also the basis of their tort claims, equitable estoppel will not lie (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]). Here, equitable estoppel is inapplicable because the alleged fraudulent concealment forms the basis of both plaintiff's estoppel argument and the underlying claims (*see Kaufman* at 122).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Gische, JJ.

13995 Lucila Parra, Index 104732/11
Plaintiff-Respondent-Appellant,

-against-

The City of New York,
Defendant,

175 Dyckman LLC, et al.,
Defendants-Appellants-Respondents.

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Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellants-respondents.

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Louis B. York, J.), entered May 9, 2014, which denied defendants 175 Dykman LLC and Payless Shoesoure, Inc.'s (defendants) motion for summary judgment dismissing the complaint and denied plaintiff's cross motion to strike defendants' answer for spoliation of evidence, unanimously modified, on the law, to grant defendants' motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

In this action for personal injuries allegedly sustained by plaintiff when she tripped over a sidewalk defect, defendants

demonstrated that they lacked actual and constructive notice of the defective condition. Defendants submitted plaintiff's testimony that she had never seen the defect before, and had no knowledge of prior accidents or complaints and the testimony of defendant Payless's assistant store manager that the sidewalk was cleaned every morning, no defects were noted, and there were no complaints or prior accidents *(see Gomez v Congregation K'Hal Adath Jeshurun, Inc.*, 104 AD3d 456 [1st Dept 2013]). The Big Apple map, which was filed more than six years prior to the accident, was insufficient to raise a triable issue as to constructive notice since there was no evidence that the condition shown on that map was the same defect that caused plaintiff's fall.

The court properly denied plaintiff's cross motion for sanctions based on the supposed re-paving of the sidewalk where plaintiff was injured. Plaintiff failed to establish that defendants had an obligation to preserve the sidewalk in its

alleged dangerous condition and that they destroyed the evidence "with a culpable state of mind" (*Dulac v AC & L Food Corp.*, 119 AD3d 450, 451 [1st Dept 2014], *lv denied* 2014 NY Slip Op 87999 [2014][internal quotation marks omitted]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

62-
63 Index 650002/14
151395/15

Pensmore Investments, LLC,
Plaintiff-Respondent,

-against-

Gruppo, Levey & Co.,
et al.,
Defendants,

Wendy Levey,
Intervenor-Appellant.

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Wendy Levey,
Petitioner-Appellant,

-against-

Pensmore Investments, LLC,
Respondent-Respondent,

Hugh Levey, et al.,
Respondents.

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Rottenstreich & Ettinger, LLP, New York (Dan Rottenstreich of counsel), for appellant.

Kennedy Berg LLP, New York (Gabriel Berg of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 23, 2015, which, to the extent appealed from as limited by the briefs, denied petitioner Wendy Levey's motion to intervene, and dismissed the petition to, inter alia, stay any efforts by plaintiff, Pensmore Investment,

LLC, to seize assets in which petitioner had an interest, unanimously modified, on the law and the facts, the motion granted, and the petition reinstated as to the fourth, fifth and sixth causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about May 19, 2015, which, inter alia, granted plaintiff's application for a turnover order, directing the sheriff to hold an auction and sale and to hold the proceeds in escrow, unanimously modified, on the law and the facts, to vacate the turnover order and the direction of an auction and sale, the matter remanded for further proceedings in accordance herewith, and as so modified, affirmed, without costs.

Pensmore seeks, pursuant to CPLR 5225, enforcement of a money judgment it obtained against Hugh Levey. The judgment was the result of a settlement made by Hugh to personally guarantee a debt owed by codefendant Gruppo, Levey. Pensmore then obtained a turnover order, requiring Hugh to turn over his personal property in satisfaction of his debt. The turnover order included personal property claimed to belong to Hugh that was located in former residences he once shared with petitioner, his estranged wife. Wendy sought leave to intervene in this enforcement proceeding and separately commenced a second proceeding before the same court, claiming that the property Pensmore seeks to have

turned over does not belong to Hugh, but is her separate property. The overlapping relief primarily sought by Wendy in both proceedings is a permanent stay of the enforcement of the turnover order and a declaration that Wendy is the sole owner of certain personal property. Hugh and Wendy are also adversaries in a pending divorce action.

We find that under the circumstances presented in this case the trial court should have allowed Wendy to intervene and should have held a hearing to determine whether the personal property on which Pensmore seeks to have the Sheriff levy is Wendy's separate property.

As a preliminary matter, we agree with Wendy that because Hugh was not in physical possession of the property which is the subject of the turnover order, the enforcement proceeding should have been brought as a special proceeding pursuant to CPLR 5225(b). Wendy was required to have been named as a party and separately served with the petition, because she is the one in actual possession of the disputed property (CPLR 5225[b] McKinney's Practice Commentary, 5225.5). Although Pensmore did not properly name Wendy, the error could have been cured by permitting Wendy to intervene, so long as the burden of proof remained on the judgment creditor (Pensmore) to establish that

the judgment debtor (Hugh) has an interest in the property that is superior to the person in actual possession (Wendy) (*see Petrocelli v Petrocelli Elec. Co., Inc.*, 121 AD3d 596 [1st Dept 2014]).

The trial court was required to hold a hearing to determine whether the personal property in Wendy's possession is her sole separate property or marital property. The personal property in this case is located in each of Hugh and Wendy's two former marital residences, an apartment in Manhattan and a home in Connecticut. For several years, only Wendy has occupied those residences. Wendy claims that most of the contents, including jewelry, silverware, furs, furnishings and artwork, is her separate property, primarily because it was received by her from her mother and/or grandmother by gift or devise. In the case of certain artwork, she claims it was assigned to her by Hugh in 1991[1], years before he personally guaranteed the debt underlying the instant judgment. Wendy is not claiming that the property Pensmore seeks to levy on is "marital property" in which she has

[1]When Hugh filed for bankruptcy in 1993, he filed a statement with that court stating he had no interest in the artwork, and that it belonged to Wendy. She claims the artwork was assigned to her in satisfaction of a $1 million loan she made to Hugh, which he defaulted on and she foreclosed on.

an inchoate right to equitable distribution. Rather she is claiming that the property is not marital at all, but separate property that she acquired by bequest, devise, or descent, or gift (Domestic Relations Law § 236[B][1][d]). In this regard she argues that Hugh is only too happy to stand mute while Pensmore uses her property to satisfy debt in his individual name.

Although the court permitted Wendy an opportunity to bring in documentation demonstrating ownership, the court ultimately denied all of the requested relief, finding that the property is "marital property" which is not protected against the reach of creditors until after it is distributed in a divorce action. While we agree that an inchoate right to equitably share in marital property cannot be protected against third party creditors of a debtor spouse (*see Hallsville Capital, S.A. v Dobrish*, 87 AD3d 933 [1st Dept 2011]), the same rule does not hold true for separate property of the non-debtor spouse. Domestic Relations Law § 236[B] provides that "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held" is marital property (Domestic Relations Law § 236 [B][1][c]; *see Fields v Fields*, at 162). There is an exception,

however, for "property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;" such property is the separate property of that spouse (DRL § 236 [B][1][d]; *see Fields v Fields*, *supra*). Separate property, is not "marital property" and it is not equitably distributed in a divorce action (*see Tatum v Simmons*, 133 AD3d 550 [1st Dept 2015]; *Spielfogel v Spielfogel*, 96 AD3d 443 [1st Dept 2012], *lv denied* 21 NY3d 978 [2013]; *Epstein v Epstein*, 289 AD2d 78 [1st Dept 2001]). Although neither spouse has a vested interest in any property that is otherwise marital until it is distributed in a divorce action, separate property, unless transmuted or commingled, retains its character as the property of the spouse who owns it both during and after the marriage (see *Wiener v Weiner*, 57 AD3d 241 [1st Dept 2008]; *Shai v Shai*, 301 AD2d 461 [1st Dept 2003]).

Without a hearing, the trial court concluded that all of the personal property in the residences was "marital property." The trial court's conclusion was based upon the rebuttable presumption that property acquired during a marriage is marital (*Fields* at 163) and the lack of documentary evidence establishing Wendy's individual ownership. In denying Wendy's petition, the court observed that she did not provide any documentary proof of

her ownership and that certain items, even if devised to her, were not specifically identified in any testamentary document.

The property at issue, however, is tangible personal assets, which are not typically titled assets (e.g. a fur coat, furniture, silverware, etc.). Wendy has put before the court her own affidavit specifically identifying assets she was gifted or received by devise. She put in her mother's last will and testament, which, although not having a schedule of specific items, generally bequeaths personal effects and property to Wendy. She has included a 1996 letter from an attorney who filed the gift tax return for her grandmother's estate, referring to the items of tangible personal property distributed to Wendy and other heirs as part of that estate. She has put in documents showing that Hugh did not claim any of the items she identified as belonging to him in a personal bankruptcy petition he filed.

There are circumstances when testimony alone can be a sufficient basis to establish ownership of property (*Spielvogel* at 444). A bequest of personal property can be part of the residue of a will after all specific gifts have been made. Thus, the absence of a personal property schedule in a will does not disprove a bequest of personal property where, as here, there is a residuary clause. Proof of inter vivos gifting does not

necessarily require documents, so long as there is evidence of an intent to make a gift, delivery and acceptance (*see Gruen v Gruen*, 68 NY2d 48 [1986]; *In re Corn's Estate*, 141 NYS2d 16 [Surr Ct, Kings County 1955]; *In re Woodin's Estate*, 36 NYS2d 448 [Surr Ct, NY County 1942]). Wendy's proof on the issue of ownership may not have been conclusive, but it was enough to warrant a hearing. The informal process by which the court allowed Wendy to present documents did not suffice under these circumstances. Although Hugh obtained home insurance coverage for the contents of both former marital residences, this proof is not dispositive of ownership/title of the contents. The credibility of the witnesses' claims and the weight to be given any of the circumstantial documentary evidence proffered should be assessed at a hearing.

We agree, however, with the trial court that insofar as the petition sought relief under the Debtor and Creditor Law, the petition was properly dismissed. Hugh's co-guarantor raised the same defense, lack of consideration for the personal guaranty, which the trial court rejected because it was in connection with a settlement agreement, constituting consideration for the guaranty (*see Sun Oil Co. v Heller*, 248 NY 28 [1928]). Wendy's argument is indistinguishable. Her claims regarding the debt and

its effect on distribution of marital assets between her and Hugh belong in the divorce action.

We have considered petitioner's remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

381 Underhill Holdings, LLC, Index 652078/11
Plaintiff-Appellant,

-against-

Travelsuite, Inc., et al.,
Defendants,

Scott Ziegler,
Defendant-Respondent.

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Pryor Cashman LLP, New York (Robert M. Fleischer of counsel), for appellant.

Ziegler, Ziegler & Associates LLP, New York (Christopher Brennan of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 9, 2014, which denied plaintiff's motion for summary judgment on its breach of contract, promissory estoppel, unjust enrichment, quantum meruit and account stated causes of action, and granted defendants' cross motions for summary judgment dismissing those causes of action, unanimously modified, on the law, to deny the cross motions as to the unjust enrichment cause of action as against the V1 defendants and the quantum meruit and account stated causes of action, and otherwise affirmed, without costs.

The motion court correctly granted summary judgment

dismissing the breach of contract claim against the V1 defendants on the ground that they were not parties to the subject agreement and, by virtue of its merger clause, could not be shown by extrinsic evidence consisting of drafts of the agreement, negotiations and certain communications to have been the intended obligors. We reject the contention that the V1 defendants, as strangers to the agreement, cannot invoke the merger clause and the parol evidence rule under the instant circumstances, where a party to the written agreement seeks not merely to alter or contradict its terms but to use parol to add a stranger as a party. Notably, the leading out-of-state authority upon which plaintiff relies (*Fillinger v Northwestern Agency, Inc. of Great Falls*, 938 P2d 1347, 283 Mont 71 [1997]) was soon distinguished by the court that decided it as not involving the stranger exception to the application of the parol evidence rule at all (*see Habets v Swanson*, 16 P3d 1035, 303 Mont 410, 418 [2000]).

The promissory estoppel cause of action was correctly dismissed in the absence of a clear and unambiguous promise by the V1 defendants to pay plaintiff (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]). The unjust enrichment causes of action against the individual defendants were also

properly dismissed in light of their unrebutted affidavits explaining why they were not unjustly enriched by taking flights on plaintiff's seaplane.

However, there are at least issues of fact as to whether plaintiff had a reasonable expectation of compensation from the V1 defendants and as to whether these defendants were unjustly enriched in not paying to plaintiff the fares they had collected. Given plaintiff's claim that the V1 defendants may be held liable as third-party beneficiaries, which was not challenged on the motions and remains viable at this juncture, there is the possibility of an underlying liability that could support a cause of action for an account stated based on plaintiff's unpaid invoices (*see Unclaimed Prop. Recovery Serv., Inc. v UBS PaineWebber Inc.*, 58 AD3d 526 [1st Dept 2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

484 The People of the State of New York, Ind. 400/12
Respondent,

-against-

David Morgenshtern,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered May 30, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 15, 2016

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

486 In re Mahmuda U.,
Petitioner-Appellant,

-against-

Mohammed S. I.,
Respondent-Respondent.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Tennille M. Tatum-Evans, New York, for respondent.

Order, Family Court, New York County (Monica Shulman, Referee), entered on or about September 12, 2014, which dismissed petitioner's motion to vacate a two-year consent order of protection that had been issued in her favor against respondent and to set the matter down for a hearing on the allegations in her family offense petition, unanimously affirmed, without costs.

The Referee properly dismissed petitioner's motion to vacate the order of protection, because petitioner did not show good cause for such relief (*see* Family Ct Act §§ 841[d]; 844). Petitioner, as movant, had the burden of establishing that her consent to the order of protection was not knowing and/or voluntary, in that it was given due to "fraud, collusion, mistake, accident, or some other similar ground"

(*Matter of Nori-Alyce Y. v Mark Y.*, 100 AD3d 1116, 1117 [3d Dept 2012]; *see also Matter of Gabriella R. [Mindyn S.]*, 68 AD3d 1487 [3d Dept 2009], *lv dismissed* 14 NY3d 812 [2010]). However, she acknowledged that she had told her counsel that she was not impaired and consented to the order of protection on the day it was entered, and her subsequent claims that her judgment was impaired due to medication and the extreme stress of being in the courtroom with respondent are insufficient to warrant vacating the consent order of protection.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

488 Aldo Scoz, Index 152630/12E
Plaintiff-Appellant,

-against-

J&Y Electric and Intercom Company Inc., et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

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Zalman Schnurman & Miner P.C., New York (Marc H. Miner of counsel), for appellant.

Law Offices of Safranek, Cohen & Krolian, White Plains (Matthew F. Rice of counsel), for J & Y Electric and Intercom Company Inc., respondent.

Harrington, Ocko & Monk, LLP, White Plains (I. Paul Howansky of counsel), for the Elizabeth Seton Housing Development Fund Corporation, respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 7, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the Labor Law § 241(6) cause of action as against them, and denied plaintiff's cross motion for partial summary judgment on that claim, unanimously affirmed, without costs.

Plaintiff, an independent contractor, who intentionally used the wrong tool for the job, and rigged it a manner that he knew

was unsafe, was the sole proximate cause of his accident (*see Kerrigan v TDX Constr. Corp.*, 108 AD3d 468 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]). The lack of guards or a spreader that may have been required by Industrial Code (12 NYCRR) § 23-1.12(c) resulted from plaintiff's misuse of the saw. Similarly, while 12 NYCRR 23-1.5(c) requires damaged equipment to be replaced or repaired, the use of a saw lacking a guard was the result of plaintiff's intentional use of the wrong, jury-rigged tool, and the manner in which he used the saw, so that only the blade protruded from the plywood, would have rendered any guard ineffectual.

Plaintiff's reliance on *Leon v Peppe Realty Corp.* (190 AD2d 400 [1st Dept 1993]) is misplaced; to the extent *Leon* holds that the failure to provide reasonable and adequate protection is a violation of Labor Law § 241(6) without reference to any

Industrial Code provision, it is not good law (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Friedman, J.P., Sweeny, Richter, Gische, JJ.

489 East Harlem Abyssinian Triangle Corporation,
Plaintiff-Appellant,

-against-

New York City Economic Development Corporation,
Defendant-Respondent.

Index 651211/14

Windels Marx Lane & Mittendorf, LLP, New York (Scott R. Matthews of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered October 9, 2014, dismissing the complaint with prejudice and declaring that defendant is not obligated to transfer its 49% interest in the East Harlem Abyssinian Triangle Limited Partnership (EHAT LP) to plaintiff, unanimously affirmed, without costs.

EHAT LP's governing limited partnership agreement was entered into between the parties in 1995 for the purpose of acquiring certain City-owned real property on which to develop a supermarket. The EHAT LP purchased the property from defendant, paying an amount in cash and giving a purchase money mortgage secured by a note for the remainder; it entered into arrangements

with other lenders, including a mortgage from Citibank, to obtain funds needed for the development project.

The partnership agreement grants plaintiff an option to purchase defendant's partnership interest for $1.00, but only in the event that defendant has transferred its interest to a community-based organization and that that organization has become a "Prohibited Person" under the terms of the agreement or has ceased to exist. As defendant has never transferred its partnership interest to a community-based organization, the option granted by the partnership agreement was never triggered.

In November 2005, plaintiff wrote to defendant concerning its interest in acquiring defendant's partnership, and the need to resolve the issue of the "option" so that it could refinance the Citibank loan. In February 2006, defendant's Executive Committee adopted a resolution authorizing its president to enter agreements, including a transfer of defendant's interest to plaintiff for $1.00, in connection with the proposed refinancing, in consideration for, inter alia, prepayment by EHAT LP of part of the amount owed on the purchase money mortgage note. Because the February 2006 resolution authorized the transfer of defendant's interest only as part of a larger refinancing proposal, the resolution did not "comply with the terms of [any]

offer" by plaintiff and was "equivalent to a rejection and counteroffer" (*Lamanna v Wing Yuen Realty*, 283 AD2d 165, 166 [1st Dept 2001] [internal quotation marks omitted], *lv denied* 96 NY2d 719 [2001]).

It is undisputed that the agreements listed in the 2005 resolution were never negotiated and the proposed 2006 refinancing never implemented. Thus, plaintiff never accepted defendant's offer to transfer its interest as part of a refinancing, in compliance with the terms of the offer (*see Silber v New York Life Ins. Co.*, 92 AD3d 436, 440 [1st Dept 2012]). Moreover, even if the February 2006 resolution was binding on defendant without any manifestation of acceptance by plaintiff, the transfer of defendant's interest was only contemplated as part of the proposed refinancing, with interdependent consideration therefor, and thus was not severable

from the proposed refinancing or separately enforceable (*see First Sav. & Loan Assn. of Jersey City, N.J. v American Home Assur. Co.*, 29 NY2d 297 [1971]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

490 The People of the State of New York, Ind. 5802/11
Respondent,

-against-

Theodore Paris,
Defendant-Appellant.

_____

The Law Offices of Audrey A. Thomas, PC, Rosedale (Audrey A. Thomas of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karen Schlossberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 20, 2012, convicting defendant, after a jury trial, of assault in the first degree and three counts of attempted robbery in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, there was overwhelming evidence supporting the elements of each crime.

The court properly exercised its discretion in denying defendant's mistrial motion, made after the prosecutor asked a witness if she was afraid. Defendant's objection was sustained,

the question was never answered, and the court's curative actions were sufficient (*see People v Santiago*, 52 NY2d 865 [1981]). All of defendant's remaining claims of prosecutorial misconduct, including those relating to examination of witnesses, summation, and compliance with statutory and constitutional disclosure obligations, are unpreserved or otherwise procedurally defective, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

Based on the factors discussed in *People v Foy* (32 NY2d 473 [1973]), we find that the court properly exercised its discretion in denying defendant's request for a continuance during trial. Their was no impairment of defendant's right to present a defense. Defendant's claim that he was deprived of his right to testify is entirely without merit, because the record is clear that he did not wish to testify. We also reject defendant's claim that the court deprived him of an opportunity to elicit evidence in an effort to provide "context" for recorded phone calls in which he admitted his guilt.

Defendant was not entitled to either a circumstantial evidence charge (*see People v Hardy*, 26 NY3d 245 [2015]), or a missing witness charge (*see People v Gonzalez*, 68 NY2d 424, 427-428 [1986]). Defendant's challenge to the court's charge on

accomplice corroboration (*see* CPL 60.22) is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the court should not have listed a nontestifying codefendant along with the testifying accomplices in its explanation of accomplice status as a matter of law. However, the error was harmless in light of the court's proper charge on the prosecution's burden to prove beyond a reasonable doubt that defendant acted in concert with the codefendant, as well as the overwhelming evidence of defendant's accessorial liability.

Defendant's Confrontation Clause argument is without merit. A detective's testimony that defendant's girlfriend handed him defendant's cell phone was not admitted for the purpose of proving defendant's ownership of the phone. That fact was established by other evidence.

After an appropriate discussion with a juror who had called out an inquiry regarding the trial schedule to the prosecutor, the court properly denied defendant's request that the juror be excused (*see People v Lewis*, 17 NY3d 348 [2011]).

The argument that defendant characterizes as a claim of

ineffective assistance of counsel is essentially a claim of prejudice arising from the conduct of the prosecutor and the rulings of the court. We find this claim unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

491 Yousef Yahudaii, Index 103449/08
Plaintiff-Appellant-Respondent,

-against-

Nourallah Baroukhian, et al.,
Defendants-Respondents-Appellants,

Manouchehr Malekan, et al.,
Defendants.

_____

Cox Padmore Skolnik & Shakarchy LLP, New York (Stefan B. Kalina of counsel), for appellant-respondent.

Law Offices of Daniel A. Thomas, P.C., New York (Daniel A. Thomas of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 5, 2012, which, following a nonjury trial, dismissed the complaint without prejudice, and dismissed defendants Nourallah Baroukhian and Nourallah Baroukhian d/b/a East 115th Associates' counterclaims with prejudice, unanimously affirmed, with costs.

The trial court's well-reasoned determination that plaintiff provided $275,000 at a closing on December 1, 1997 is based on its reasonable assessment of the witnesses' credibility and a fair interpretation of the evidence (*see Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 320 [1st Dept 2011]). The record

also supports the court's finding that the mortgage and note were validly assigned by nonparty Joanne Sims to nonparty True Gate Holding Ltd.

Although consideration was not required to effectuate the assignment by True Gate to plaintiff, since the assignment is in writing and signed by the assignor (*see* General Obligations Law § 5-1107), nevertheless the assignment is invalid, because it was not permitted under the True Gate agreement. Therefore, plaintiff lacks standing to enforce True Gate's foreclosure rights in his individual capacity (*see Scott v Pro Mgt. Servs. Group, LLC*, 124 AD3d 454 [1st Dept 2015]).

The judgment of foreclosure is a nullity, since, unbeknownst to the court, the parties had discontinued the action before the judgment was entered. Therefore, the judgment did not bar any subsequent assignments of the mortgage and note as a matter of law.

There is no support in the record for the counterclaims. We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

492 Little Rest Twelve, Inc., Index 650209/10
Plaintiff,

-against-

Nina Zajic, et al.,
Defendants.

- - - - -

Nina Zajic, et al.,
Third Party-Plaintiffs-Appellants,

-against-

Martin Russo, et al.,
Third Party-Defendants-Respondents.

_____

Sternik & Zeltser, New York (Emanuel Zeltser of counsel), for appellants.

Gusrae Kaplan Nusbaum PLLC, New York (Martin P. Russo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 11, 2014, which, to the extent appealed from, granted third-party defendants' motion to dismiss the third-party complaint with prejudice, and declined to disqualify third-party defendants as plaintiff's counsel, unanimously modified, on the law, to make the dismissal without prejudice, and otherwise affirmed, without costs.

As discussed below, the motion to dismiss the third-party complaint was correctly granted. However, since it is based on a

failure to state a cause of action, the dismissal should be without prejudice to apply upon a proper showing for leave to plead again (*Morpheus Capital Advisors LLC v USB AG*, 105 AD3d 145, 154 [1st Dept 2013], *revd on other grounds* 23 NY3d 528 [2014]).

Third-party plaintiffs fail to allege a duty owed them by third-party defendants that would support a claim for contribution or indemnification (*see Raquet v Braun*, 90 NY2d 177, 183 [1997]; *Garrett v Holiday Inns*, 86 AD2d 469, 471 [4th Dept 1982], *mod on other grounds* 58 NY2d 253 [1983]).

In support of the claim alleging a violation of Judiciary Law § 487, the third-party complaint contains no nonconclusory allegations that the alleged misconduct was "merely a means to the accomplishment of a larger fraudulent scheme" (*Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d 211, 217 [1975]) "greater in scope than the issues determined in the prior proceeding" (*Specialized Indus. Servs. Corp. v Carter*, 68 AD3d 750, 752 [2d Dept 2009] [internal quotation marks omitted]). Thus, the claim is not properly asserted in this action but would be appropriately raised in the still pending underlying action, where the alleged misconduct occurred (*see Seldon v Spinnell*, 95 AD3d 779 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]; *Melnitzky*

v Owen, 19 AD3d 201 [1st Dept 2005]).

In support of the fraud claim, the third-party complaint fails to allege specific facts demonstrating which statements or filings were knowingly and materially false, and fails to identify misrepresentations actually made by third-party defendants (*see Barbarito v Zahavi*, 107 AD3d 416, 419 [1st Dept 2013]). Nor does it allege justifiable reliance (*see Lemle v Lemle*, 92 AD3d 494, 499 [1st Dept 2012]). The claim of aiding and abetting fraud fails to allege an underlying fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]).

Since the third-party complaint does not allege that third-party defendants, as plaintiff's attorneys, acted outside the scope of their authority as plaintiff's agents, it fails to state a cause of action for tortious interference with contract (*see Burger v Brookhaven Med. Arts Bldg.*, 131 AD2d 622, 623-624 [2d Dept 1987]; *Kartiganer Assoc. v Town of New Windsor*, 108 AD2d 898, 899 [2d Dept 1985], *appeal dismissed* 65 NY2d 925 [1985]). The third-party complaint also fails to identify the particular provision of the contract allegedly breached (*see Williams v Citigroup, Inc.*, 104 AD3d 521 [1st Dept 2013]).

In support of the assault and battery claims, third-party plaintiffs fail to allege that they themselves were either assaulted or battered by third-party defendants.

Under the circumstances of this case, and in view of its conclusion that the third-party complaint is "patently defective," the court properly declined to disqualify third-party defendants as plaintiff's counsel.

We have considered third-party plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

493 The People of the State of New York, Ind. 4626/13
Respondent,

-against-

Shawn Gill,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan Merchan, J.), rendered August 15, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 15, 2016

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

494 Zohar CDO 2003-1 Limited, et al., Index 651473/11
Plaintiffs-Appellants,

-against-

Xinhua Sports & Entertainment Limited, et al.,
Defendants,

Loretta Freddy Bush,
Defendant-Respondent.

_____

Shapiro Arato LLP, New York (Eric S. Olney of counsel), for appellants.

Drinker Biddle & Reath LLP, New York (Clay J. Pierce of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 15, 2015, which granted defendant Loretta Freddy Bush's motion for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion denied.

The motion court correctly found that, in view of defendant Xinhua Sports & Entertainment Limited's (XSEL) contractual agreements with its affiliates, defendant Bush's representations that XSEL had "effective control" over those companies were not false when made, and therefore could not support a cause of action for fraudulent inducement.

However, Bush failed to eliminate all material issues of fact as to whether she knew that XSEL's internal financial projections sent to plaintiffs in October 2008 and March 2009, its 2010 revenue forecast for Shanxi Satellite TV sent to plaintiffs in December 2008, and the earnings reported in its 2007 Form 20-F were false and unreasonable (*see East 32nd St. Assoc. v Jones Lang Wootton USA*, 191 AD2d 68 [1st Dept 1993]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

495 In re Babacar Niang, Index 402136/13
Petitioner,

-against-

The New York City Department of Education, et al.,
Respondents.

_____

South Brooklyn Legal Services, Brooklyn (Nicole Salk of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Determination of respondents (collectively, DOE), dated August 20, 2013, which permanently revoked petitioner's certification to drive a school bus for failure to submit to a drug test on the day of his accident, unanimously annulled, without costs, the petition granted, the certification reinstated, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Margaret A. Chan, J.], entered January 2, 2015), remanded for a determination of incidental damages, if any.

Even if the article 78 court improperly transferred this proceeding to this Court, we are required to retain jurisdiction and determine the issues raised, applying the arbitrary and

capricious standard of review (*see Matter of Burrell v Ortiz*, 128 AD2d 391, 392 [1st Dept 1987]). Respondents' determination revoking petitioner's certification to drive a bus is arbitrary and capricious and contrary to its own regulation.

While DOE implemented a new policy regarding substance and alcohol use by transportation workers on June 25, 2009, Chancellor's Regulation C-102, this new policy does not provide for revocation where a bus driver fails to take a nonrequired drug test. The C-102 provisions requiring a postaccident test explicitly apply only when the accident involves loss of life, bodily injury, disabling damage to the vehicle, or after a third accident within any twelve month period, but do not apply here, where it is petitioner's first accident, in which no one was injured and no vehicle was disabled (*see Matter of Gomez v New York City Dept. of Educ.*, 50 AD3d 583, 584 [1st Dept 2008]). Further, we note that petitioner took a drug test within 24 hours and that the test was negative.

Petitioner is entitled to a hearing to determine whether any

incidental damages resulted from DOE's determination (*see Metropolitan Taxicab Bd. Of Trade v New York City Taxi & Limousine Commn.*, 115 AD3d 521, 522 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

499 GRP Loan, LLC, Index 24119/06
Plaintiff-Respondent,

-against-

Junior Smith,
Defendant,

Angela Smith,
Nonparty Appellant.

_____

Andrene Smith, Bronx, for appellant.

Jeffrey A. Kosterich, LLC, Tuckahoe (Robert A. Levey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 14, 2015, which denied the part of nonparty appellant's motion seeking to cancel the notices of pendency, and granted the part seeking to reargue her motion to vacate a September 2010 judgment of foreclosure, unanimously affirmed, without costs.

The motion court correctly treated appellant's motion as one for reargument, since no new facts were set forth that could not have been presented on the initial motion, and, in any event, no explanation was offered for not having presented the facts previously. Although the court stated that it was denying the motion, it effectively granted the motion by addressing the

merits, correctly holding that appellant's arguments were precluded by collateral estoppel, since they could have been raised on the prior motion. Contrary to appellant's premise, successive notices of pendency are authorized in a foreclosure action, the invalidity or expiration of prior notices notwithstanding (see CPLR 6516[a]).

We have considered appellant's other contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

500 Board of Directors of 35 E. 68th Street Realty Corp., Plaintiff-Appellant, -against- The New York City Landmarks Preservation Commission, et al., Defendants-Respondents. Index 162657/14

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Carol Edmead, J.), entered on or about March 4, 2015,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 18, 2016,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MARCH 15, 2016

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Gische, JJ.

502-
503 The People of the State of New York, Respondent,

Ind. 4799/13
608/14

-against-

Joseph M. Alvarez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered April 2, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

505 The People of the State of New York, Ind. 686/12
Respondent,

-against-

Raquel Freytes,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey Richards of counsel), for respondents.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered October 10, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 15, 2016

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

506 In re Iris Wise, Index 100460/14
Petitioner,

-against-

New York City Human Resources Administration, etc., et al.,
Respondents.

_____

Jones Morrison LLP, Scarsdale (Steven T. Sledzik of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Donna B. Morris of counsel), for respondents.

_____

Determination of respondents, dated January 24, 2013, which, upon a finding that petitioner participated in a scheme to improperly transfer cases into the East End Job Placement Center, in violation of Human Resources Administration Code of Conduct § III(1), (4), (11) and (37), Penal Law §§ 195.00 (official misconduct) and 156.25 (computer tampering), and Mayoral Directive 81-2 (unauthorized computer use), terminated petitioner's employment, unanimously modified, on the law, to vacate the finding that petitioner violated Code of Conduct § III(11), and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered on or about July 3,

2014), otherwise disposed of by confirming the remainder of the determination, without costs.

The finding that petitioner violated Code of Conduct § III(11) must be vacated because petitioner was not charged with violating that section and had no reasonable opportunity to respond to such a charge (*see Matter of Ahsaf v Nyquist*, 37 NY2d 182 [1975]; *Statharos v New York City Taxi & Limousine Commn.*, 269 AD2d 280 [1st Dept 2000], *lv denied* 95 NY2d 767 [2000]).

As to the remaining charges, substantial evidence supports the determination (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). Hearing testimony, admission statements, and documentary evidence, including investigation reports, case transfer documents, lists, emails, and regional performance results, establish that petitioner, a deputy director of respondent agency's East End Center, knowingly and actively participated with her immediate supervisors in a scheme to transfer job placement cases from other agency centers in the region to the East End Center so as to satisfy the agency's job-placement goals for East End Center and to reduce agency pressure on the center arising from years of under-performance. The evidence and reasonable inferences drawn therefrom establish that petitioner, in furtherance of the case-

transfer scheme, inter alia, knowingly co-signed official documents that permitted the improper transfer of cases, entered the case transfers into the center's computer system and directed staff personnel to make such entries, and collaborated with the center's director to destroy the improper case transfer documents despite agency document retention rules.

The termination of petitioner's employment with the agency does not, under the circumstances, shock one's conscience or sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32 [2001]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

507 The People of the State of New York, Respondent, Ind. 14/11 3505/10

-against-

Felipe Domingues, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel) and Freshfields Bruckhaus Deringer US LLP, New York (Scott A. Eisman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Cassandra Mullen, J.), rendered May 10, 2012, convicting defendant, after a jury trial, of two counts each of burglary in the second degree and grand larceny in the third degree, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). In each of the two burglaries, defendant stole jewelry from the bedroom of an apartment whose resident employed defendant as a dog walker. Defendant argues that in each instance, the evidence established only larceny, but that, in view of defendant's license to enter the apartment, it

failed to satisfy the knowing, unlawful entry element of burglary. However, the evidence supports the conclusion that defendant reasonably understood his license to enter the apartments to be conditioned on his limiting his presence to the apartments' entrance areas, which were the only areas he needed to enter in order to greet the dogs, put on their leashes, and otherwise perform his duties (*see People v Powers*, 138 AD2d 806, 807-808 [3rd Dept 1998]). Although criminal intent may not transform a licensed entry into an unlawful one (*People v Graves*, 76 NY2d 16 [1990]), defendant's entry into the bedrooms was not rendered unlawful by his criminal intent, but by his going beyond the limits of his license to enter the apartment.

This determination renders academic defendant's argument that in the event this Court vacates his burglary convictions, upon which he received the minimum lawful sentence, it should also reduce his sentences on the larceny convictions.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

508-
509 Index 304129/11

Shelarv Graham,
Plaintiff-Appellant,

-against-

YMCA of Greater New York, et al.,
Defendants-Respondents.

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Steven Siegel, PC, Kew Gardens (Nathan V. Bishop of counsel), for appellant.

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered October 31, 2014, dismissing the complaint in its entirety pursuant to an order, same court and Justice, entered October 2, 2014, which granted the motion of defendant YMCA of Greater New York, also sued herein as YMCA of Greater New York-Bronx, for summary judgment, unanimously modified, on the law, to reinstate the complaint to the extent it alleges that the YMCA had constructive notice of the alleged dangerous condition, and otherwise affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that she slipped and fell on a puddle of

water that was on the floor of a YMCA owned and maintained by defendants. The YMCA made a prima facie showing that it did not cause or create the alleged condition, because plaintiff testified that she did not see the YMCA's employees working at the accident location prior to the incident and did not know where the water came from (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 [1st Dept 2013]). The YMCA also made a prima facie showing that it lacked actual notice of the alleged condition, because the building engineer for the premises averred that he oversaw the maintenance of the premises and did not receive complaints about water on the floor prior to the accident (*see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571, 571 [1st Dept 2014]). However, the YMCA failed to make a prima facie showing that it lacked constructive notice of the alleged defect. The building engineer failed to aver as to when the YMCA's employees last cleaned or inspected the accident location before the

incident occurred (*see Seleznyov v New York City Tr. Auth.*, 113 AD3d 497, 498 [1st Dept 2014]).

Given the foregoing determination, there is no need to consider the sufficiency of plaintiff's opposing papers (*id.*).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

510 Jacoby & Meyers, LLP, et al., Index 403550/10
Plaintiffs-Respondents,

-against-

Michael Flomenhaft, et al.,
Defendants-Appellants.

_____

The Flomenhaft Law Firm, PLLC, New York (Stephen D. Chakwin Jr. of counsel), for appellants.

Hinshaw & Culbertson LLP, New York (Katie M. Lachter of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 14, 2014, which denied defendants' motion for partial summary judgment dismissing the breach of contract claim in plaintiffs' third amended complaint, unanimously affirmed, without costs.

As Supreme Court found and the parties do not dispute, the arguments defendants raised in support of their motion were raised in a prior summary judgment motion and were rejected by the prior motion court and the Second Department (*see Jacoby & Meyers, LLP v Flomenhaft*, 94 AD3d 948 [2d Dept 2012]).[2] On December 21, 2010, the case was transferred from Orange County.

[2] On December 21, 2010, the case was transferred from Orange County.

Given that defendants had a full and fair opportunity to litigate their arguments, the Second Department's resolution of those arguments on the merits constitutes the law of the case and is binding on Supreme Court as well as this Court (*Board of Mgrs. of the 25 Charles St. Condominium v Seligson*, 106 AD3d 130, 135 [1st Dept 2013]; *see also People v Evans*, 94 NY2d 49, 502 [2000]). Defendants failed to present any new evidence on its second motion that was unavailable to them at the time the first motion was made, or that would warrant consideration of the second motion. Accordingly, there was no basis for the second motion (*see Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 527 [1st Dept 2013]), and Supreme Court correctly denied the motion as barred by the law of the case (*see* 106 AD3d at 135).

We have considered defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

511-
512 Index 21498/06

Susan Dedona, etc., et al.,
Plaintiffs-Appellants,

-against-

Robert DiRaimo, M.D., et al.,
Defendants-Respondents.

Hemal Shah, M.D., et al.,
Defendants.

_____

Law Offices of Francis X. Young, PLLC, White Plains (Francis X. Young of counsel), for appellants.

LeClair Ryan, New York (Barry A. Cozier of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Faviolo Soto, J.), entered November 13, 2014, which denied plaintiffs' motion to, among other things, vacate an order, same court and Justice, entered on or about July 29, 2014, which had granted defendants' oral motion during trial to dismiss plaintiffs' complaint (dismissal order), unanimously reversed, on the law, without costs, the facts, and in the exercise of discretion, without costs, the motion to vacate granted, and the matter remitted for a new trial before a different Justice. Appeal from dismissal order, unanimously dismissed, without costs.

Plaintiff Susan Dedona's husband, then 31 years old, was

involved in a motorcycle accident and sustained injuries to his femur, which led to five surgeries and his ultimate death. Plaintiff commenced this action against, among others, defendant Dr. DiRaimo, a vascular surgeon who attempted to restore circulation in decedent's leg.

After jury selection, but before opening statements, defendants moved, in limine, to preclude plaintiffs from presenting evidence or expert testimony on plaintiffs' theory that Dr. DiRaimo departed from care and caused or contributed to decedent's death by failing to ligate (tie off) decedent's superficial femoral artery.

The trial court improvidently exercised its discretion in granting the motion and in dismissing the complaint based on the preclusion of evidence. Defendants' argument that they had no notice of plaintiffs' theory and were unfairly surprised is unavailing. The theory concerning vascularization of decedent's left leg was adequately disclosed in plaintiff's original and supplemental bills of particulars. Further, while CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time (*see LaMasa v Bachman*, 56 AD3d 340, 340-341 [1st Dept 2008]), here plaintiff served the CPLR 3101(d) expert disclosure notice about eight months before trial, which was

sufficient notice (*see Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439, 440 [1st Dept 2013]). Furthermore, during that period, defense counsel were present at several pretrial conferences and raised no objections to the expert disclosure, nor did they reject the notice (*see Rivera v Montefiore Med. Ctr.*, 123 AD3d 424, 425-426 [1st Dept 2014], *lv denied* 25 NY3d 1187 [2015]).

Given the improper preclusion of evidence, plaintiffs are entitled to a new trial (*see Gallo v Linkow*, 255 AD2d 113, 116 [1st Dept 1998]). Further, the matter should be remitted for trial before a different Justice, as the record shows that the trial court was biased in favor of defendants (*see Bank of N.Y. v Castillo*, 120 AD3d 598, 601 [2d Dept 2014]).

Plaintiff properly moved to vacate the order granting defendants' motion to dismiss, since defendants' motion was not made on notice to plaintiff and therefore not appealable as of

right (*see* CPLR 5701[a][2], [3]; *see also Sholes v Meagher*, 100 NY2d 333, 335 [2003]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

513 Selajdin Sejfuloski, et al., Index 111759/11
Plaintiffs-Appellants-Respondents,

-against-

Michelstein & Associates, PLLC,
et al.,
Defendants-Respondents-Appellants.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants-respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, Port Washington (Thomas A. Leghorn of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 23, 2014, which denied plaintiffs' motion for summary judgment, denied defendants' motion for summary judgment dismissing the claims of plaintiff Selajdin Sejfuloski's, and granted defendants' motion for summary judgment dismissing plaintiff Selvijan Sejfuloska's claim for loss of consortium, unanimously modified, on the law, to dismiss the claims of Selajdin Sejfuloski against Richard Ashman, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The motion court correctly declined to dismiss the complaint of Selajdin Sejfuloski as against defendants Michelstein &

Associates, PLLC, Michelstein & Greenberg, LLP, and Steven D. Michelstein (collectively, the firms). The firms' decision in the underlying personal injury action not to sue the tenant in possession of the office space where plaintiff Selajdin Sejfuloski was injured cannot, as a matter of law, be characterized as a reasonable course of action (*compare Rosner v Paley*, 65 NY2d 736 [1985]). Further, the firms' claim that this decision was part of a strategy in which they focused on Labor Law claims is bellied by the pleadings in the personal injury action, which allege common law liability premised on lessee status, albeit against incorrect parties. Moreover, since the firms were aware at the outset that there was no construction, renovation, or demolition going on at the time plaintiff, a daily cleaner, was hit on the head by a falling piece of cabinetry, a Labor Law strategy was of dubious merit.

Questions of fact exist, however, with regard to whether, but for the negligence of the firms, plaintiff would have recovered (*see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 67 [1st Dept 2002]). It is possible that the tenant could have been found responsible since its contractor allegedly caused and created the defect, an improperly installed cabinet, and the affidavit submitted in the underlying action did

not foreclose the possibility that tenant was on notice of a problem with the cabinet (*see e.g. Grant v Caprice Mgt. Corp.*, 43 AD3d 708, 709 [1st Dept 2007]). But such a finding cannot be said now to have been a certain occurrence but for the firms failure to name the tenant. Thus, the motion court correctly denied plaintiff summary judgment over the firms.

The motion court also correctly dismissed the derivative claims of plaintiff wife, Selvijan Sejfuloska. No evidence was adduced that the firms were even aware that the injured plaintiff was married. Thus, there was no evidence of an attorney-client relationship in the first instance (*see Fortress Credit Corp. v Dechert LLP*, 89 AD3d 615, 616 [1st Dept 2011], *lv denied* 19 NY3d 805 [2012]).

The motion court should have, however, dismissed plaintiffs' complaint as against Richard Ashman, since he was not a member of or partner in the firms that represented plaintiff.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

517 The People of the State of New York, Ind. 5749/09
Respondent,

-against-

Arthur Franklin,
Defendant-Appellant.

_____

Law Office of Robert DiDio, Kew Gardens (Elisha Rudolph of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J. at motion to controvert search warrant; Thomas Farber, J. at initial suppression hearing; Edward J. McLaughlin, J. at continued suppression hearing; Ruth Pickholz, J. at plea and sentencing), rendered January 9, 2012, as amended March 7, 2012, convicting defendant of conspiracy in the fourth degree, grand larceny in the second degree, scheme to defraud in the first degree, and identity theft in the first degree (three counts), and sentencing him, as a second felony offender, to an aggregate term of 9 to 18 years, unanimously affirmed.

At the initial suppression hearing, the court had good cause for relieving defendant's retained counsel, and to the extent defendant argues that the court did not afford defendant or

counsel an opportunity to be heard on the matter, that claim is unpreserved (*see People v Tineo*, 64 NY2d 531, 535-536 [1985]), and we decline to review it in the interest of justice. Were we to review it, we would find it unavailing. Defendant expressed no desire that this retained attorney remain on the case.

After relieving counsel, the court properly exercised its discretion in assigning an attorney who was familiar with the case and had served as defendant's legal advisor during defendant's self-representation at an earlier stage of the proceedings, notwithstanding defendant's complaint that he had not gotten along well with this attorney. Defendant's unjustified hostility to this attorney did not require selection of another, and defendant was not deprived of his right to counsel. "The right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option" (*People v Sides*, 75 NY2d 822, 824 [1990]). "[L]ooking past defendant's stated objections, there is nothing in the record indicating that defense counsel had a genuine conflict of interest with defendant or that he was in any way deficient in representing him" (*People v Linares*, 2 NY3d 507, 510 [2004]).

The court that presided over the continued suppression

hearing properly declined to grant defendant's request for an additional adjournment to allow the above-discussed, recently reassigned attorney to prepare for the suppression hearing, after the previous court had already adjourned the case for six days upon assigning that attorney. Since defendant requested different substitute counsel close to trial, and had been amply afforded the right to counsel prior to that time, it was "incumbent upon [him] to demonstrate that the requested adjournment ha[d] been necessitated by forces beyond his control and [was] not simply a dilatory tactic" (*People v Arroyave*, 49 NY2d 264, 271-272 [1980]). Defendant failed to meet that burden, since, in light of his familiarity with the case, the attorney did not seek any further time to prepare.

At the same continued hearing, the court properly denied defendant's request to represent himself. Although a request to proceed pro se at trial is generally deemed timely if asserted before trial (*see People v McIntyre*, 36 NY2d 10, 17 [1974]), defendant here waited until after the People had rested in the suppression hearing before requesting to proceed pro se within that hearing, raising a significant "potential for obstruction and diversion" (*id.*). Accordingly, the court properly denied defendant's request in the absence of "compelling circumstances"

(*id.*). We note that, over the course of the proceedings, defendant was represented by a total of seven retained or assigned attorneys, and repeatedly changed his mind about whether to represent himself.

The court properly denied defendant's suppression motion. The police had probable cause to stop defendant's vehicle for a traffic violation, regardless of any suspicion that he was involved in other criminal activity (*see People v Hurtado*, 113 AD3d 411 [1st Dept 2014], *lv denied* 22 NY3d 1199 [2014]). The police detected a strong odor of marijuana, justifying a search of the vehicle pursuant to the automobile exception (*see id.*), during which the police found a marijuana cigarette in the center console. Those observations gave rise to probable cause to arrest defendant (*see id.*), and the subsequent search of defendant's person was justified as a search incident to a lawful arrest (*see People v Banchon*, 126 AD3d 462 [1st Dept 2015], *lv denied* 25 NY3d 1069 [2015]). The court also properly found that defendant lacked standing to move to suppress a cigarette pack containing stolen property, which was possessed by a codefendant, and which was in any event abandoned by that person (*see People v Ramirez-Portoreal*, 88 NY2d 99, 112-113 [1996]).

The court properly denied defendant's motion for a hearing

to challenge the veracity of the affiant's statements in support of a search warrant (*see Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]). Defendant's contention that the affiant made a false statement about the location where the cigarette pack was abandoned is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that defendant failed to make a prima facie showing as to that statement. We also find that defendant failed to meet his burden of showing that the affiant's statement about defendant's apartment number was "knowingly false or made in reckless disregard of the truth" (*People v Tambe*, 71 NY2d 492, 504 [1988]). In any event, defendant was not entitled to a *Franks*/*Alfinito* hearing regardless of whether he met his burden as to those statements, since the remaining statements in the affidavit were sufficient to establish probable cause (*see id.* at

505). We have considered and rejected defendant's remaining arguments concerning his request for a *Franks/Alfinito* hearing. We have also considered and rejected defendant's pro se arguments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

518-
519-
520-
521 Index 651013/14

Joseph Brunner, et al.,
Plaintiffs-Respondents,

-against-

The Estate of Chaim Lax, etc., et al.,
Defendants-Appellants,

Tracy L. Klestadt, et al.,
Defendants.

_____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Herrick, Feinstein LLP, New York (William R. Fried of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 3, 2015 and April 6, 2015, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' (hereinafter defendants) motions to dismiss the first cause of action[3] pursuant to CPLR 3211(a)(3), unanimously affirmed, without costs.

[3] Defendants claim they are appealing from the denial of their motions to dismiss the first three causes of action. However, the motion court dismissed the second and third causes of action.

Defendants failed to meet their burden on this pre-answer motion to dismiss pursuant to CPLR 3211(a)(3) to establish prima facie that plaintiffs have no standing to sue on the promissory note (*see Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]). Defendants contend that the note had not been validly assigned to plaintiffs prior to the commencement of this action (*see Carlin v Jemal*, 68 AD3d 655 [1st Dept 2009]). However, an assignment need not be in writing, but can be effected by physical delivery (*see e.g. Fryer v Rockefeller*, 63 NY 268, 276 [1875]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 281 [2d Dept 2011]; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911 [3d Dept 2009]; *see also OneWest Bank FSB v Carey*, 104 AD3d 444, 445 [1st Dept 2013]; *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). The complaint alleges, "As of March 2014, [plaintiff] JBAM [Realty LLC] is in physical possession of the Note." While this allegation could have been better phrased, construed liberally and in the light of "every possible favorable inference" (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]), it can be read as saying, "Since March 2014, JBAM has been in physical possession of the Note" – especially because plaintiffs' counsel represented at oral argument that his clients had physical possession of the note at

the time they commenced their lawsuit. This action was commenced on or about March 31, 2014.

Defendants contend that discovery should be limited to standing. We leave that issue to the motion court's broad discretion (*CDR Créances S.A.S. v Cohen*, 77 AD3d 489, 491 [1st Dept 2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

522-
523 Index 106654/11

In re Joan Hansen & Company, Inc.,
Petitioner-Respondent,

-against-

Everlast World's Boxing Headquarters Corp., et al.,
Respondents-Appellants.

_____

Schlacter & Associates, New York (Jed R. Schlacter of counsel), for appellants.

Phillips Nizer LLP, New York (Bruce J. Turkle of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 2, 2014, in favor of petitioner and against respondents, unanimously reversed, on the law, without costs, and the judgment vacated. Appeal from amended order, same court and Justice, entered September 29, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In prior litigation between the parties, we have twice held that "[t]he only reasonable construction of the contract is that if no revenue is received, no commission is payable" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 111 [1st Dept 2002]; *Hansen & Co. v Everlast World's Boxing*

Headquarters Corp., 2 AD3d 266, 267 [1st Dept 2003], *lv denied* 2 NY3d 702 [2004]). Everlast was free under the contract to forgo royalties without incurring any obligation to pay commissions to plaintiff. If no royalties were paid by Circle Europe to Everlast during 2011, then no commissions are due from Everlast to plaintiff. We have also previously rejected plaintiff's argument based on equitable considerations (*Hansen & Co.*, 2 AD3d at 267).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

524 The People of the State of New York, SCID 30085/11
Respondent,

-against-

Glenn W. Evans,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Frank Glaser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cassandra M. Mullen, J.), entered on or about August 2, 2011, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841

[2014]). The alleged mitigating factors were outweighed by, among other things, the seriousness of the underlying offense, the victim's age and defendant's significant criminal record.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

525 Thomas A. Mike, Index 108385/10
Plaintiff-Appellant,

-against-

91 Payson Owners Corp., et al.,
Defendants-Respondents.

_____

Barry, McTiernan & Moore LLC, New York (David H. Schultz of counsel), for appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered October 17, 2014, upon a jury verdict in favor of defendants on the issue of liability, unanimously affirmed, without costs.

Plaintiff's objections to the subject evidentiary rulings are, to a large extent, unpreserved, and, in any event, unavailing. The rulings at issue were within the trial court's broad authority to control the courtroom and rule on the admission of evidence (*see Feldsberg v Nitschke*, 49 NY2d 636, 643-644 [1980]; *Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1st Dept 1995]]).

The trial testimony of defendants' meteorological expert, that the ice condition on which plaintiff allegedly fell, was

created on the date of the accident during a storm in progress, was entirely consistent with, and contemplated by, defendants' CPLR 3101(d) exchanges.

The grant of a missing witness charge as to plaintiff's domestic partner was proper (*see Germe v City of New York*, 211 AD2d 480 [1st Dept 1995]). The noncumulative nature of the witness's expected testimony was evidenced by, inter alia, his observations about snow and ice at the subject location, upon traversing the area as close as 30 minutes before the accident, which differed from observations made by plaintiff.

This Court's holding, in a prior appeal, wherein the denial of defendants' motion for summary judgment was affirmed, that "[p]laintiff's affidavit does not conflict with his deposition testimony" in a manner that would create any feigned issues of fact (114 AD3d 420, 420 [1st Dept 2014]), did not preclude the exploration of perceived inconsistencies, at trial.

Plaintiff's present objection to the introduction of testimony and documentary evidence, by an employee of defendants, as to snow removal efforts on the day before the accident, is undermined by the fact that plaintiff, on his case-in-chief, elicited the very testimony now objected to and used the document

at issue to refresh the witness's recollection. Unlike in *Caballero v Montefiore Med. Ctr.* (167 AD2d 219 [1st Dept 1990]), relied upon by plaintiff, there is no indication here that plaintiff ever demanded the documentation at issue during the course of discovery.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

526 Grace Gorman, et al., Index 154978/15
Plaintiffs-Appellants,

-against-

Jordan English also known as
Jordan Gross,
Defendant-Respondent,

Mobility Places, Inc.,
Defendant.

_____

Robinson McDonald & Canna LLP, New York (Brett G. Canna of counsel), for appellants.

Merle, Brown & Nakamura, P.C., New York (Stephen H. Nakamura of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 5, 2015, which, inter alia, denied plaintiffs' motion for a default judgment against defendant Jordan English, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiffs' motion for a default judgment. Although plaintiffs submitted an affidavit of the process server stating that service was made, defendant English successfully rebutted the presumption that the summons and complaint had been received, by submitting a sworn affidavit stating that he never received the summons and complaint and evidence that his building had no

record of his receiving a package on the days he was allegedly served (*see Velez v Forcelli*, 125 AD3d 643, 644 [2d Dept 2015]). Furthermore, the record demonstrates that the delay was minimal, there was no prejudice to plaintiffs, no showing of willfulness on English's part, and there is a strong public policy in favor of resolving cases on the merits (*see New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465-466 [1st Dept 2012]).

English's submissions also establish that he has a meritorious defense to plaintiffs' allegations. Contrary to plaintiffs' contention, English's affidavit contained more than "conclusory allegations or vague assertions" in response to plaintiffs' claims (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997] [internal quotation marks omitted]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

527 The People of the State of New York, Ind. 2162/13
Respondent,

-against-

Dwayne Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 29, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Acosta, Renwick, Moskowitz, JJ.

528 In re the State of New York, Index 101413/14
Petitioner-Appellant,

-against-

Jerome A. (Anonymous),
Respondent-Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Claude S. Platton of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Z. Ishee of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered September 18, 2015, which, after an evidentiary hearing, dismissed the State of New York's petition for the civil management of respondent pursuant to article 10 of the Mental Hygiene Law, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for an article 10 trial.

Upon the filing of a sex offender civil management petition, Supreme Court "shall conduct a hearing without a jury to determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management" (Mental Hygiene Law [MHL] § 10.06[g]). At an article 10 probable cause hearing, Supreme Court shall determine whether the State has

established that there is "reasonable cause to believe" that the respondent is a detained sex offender who suffers from a mental abnormality, as defined in the MHL (*Matter of State of New York v Enrique T.*, 93 AD3d 158, 167 [1st Dept 2012], *lv dismissed* 18 NY3d 976 [2012]).

Supreme Court erred in finding that the State failed to meet its probable cause burden. "[I]n article 10 proceedings, issues concerning the viability and reliability of the respondent's diagnosis are properly reserved for resolution by the jury" (*Matter of State of New York v Floyd Y.*, 135 AD3d 70, 72-73 [1st Dept 2015]), unless the respondent's evidence is deficient (*see e.g. Matter of State of New York v Donald DD.*, 24 NY3d 174, 188-191 [2014] [evidence that a respondent suffers from antisocial personality disorder and has committed sex crimes cannot, without evidence of some independent mental abnormality diagnosis, be used to support a finding that the respondent has a mental abnormality]). Here, the State expert opined that respondent suffers from a mental abnormality within the meaning of the MHL based on a diagnosis of antisocial personality disorder (ASPD) with psychopathy. Although the factfinder at trial may or may not accept the expert's opinion, the expert's testimony at the hearing was not so deficient as to warrant dismissal of the

petition at this early juncture, especially since the expert offered extensive testimony regarding the distinctions between ASPD and psychopathy, and since the Court of Appeals in *Donald DD.* did not state that a diagnosis of ASPD with psychopathy is insufficient to support a finding of mental abnormality (*see* 24 NY3d at 189-191).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK

Tom, J.P., Saxe, Richter, Gische, JJ.

16138-
16139 BMW Group, LLC, et al.,
Plaintiffs-Appellants,

-against-

Castle Oil Corporation,
Defendant-Respondent.

- - - - -

Mid Island L.P., doing business as
Madison Management of Queens,
et al.,
Plaintiffs-Appellants,

-against-

Hess Corporation,
Defendant-Respondent.

Index 650910/13
650911/13

_____

Wachtel Missry LLP, New York (Julian D. Schreibman of counsel), and Grossman LLP, New York (Stanley M. Grossman of counsel), for appellants.

White & Case LLP, New York (David G. Hille of counsel), for Hess Corporation, respondent.

Holland & Knight LLP, New York (Michael D. Hess of counsel), for Castle Oil Corporation, respondent.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 11, 2014, reversed, on the law, with costs, and defendants' motions to dismiss the complaint denied.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische, JJ.

16138-
16139
Index 650910/13
650911/13

_____x

BMW Group, LLC, et al.,
Plaintiffs-Appellants,

-against-

Castle Oil Corporation,
Defendant-Respondent.

- - - - -

Mid Island L.P., doing business as
Madison Management of Queens,
et al.,
Plaintiffs-Appellants,

-against-

Hess Corporation,
Defendant-Respondent.

_____x

Plaintiff appeals from the orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 11, 2014, which granted the motions of defendant Hess Corporation (appeal no. 16139) and defendant Castle Oil Corporation (appeal no. 16138) to dismiss the complaint.

Wachtel Missry LLP, New York (Julian D. Schreibman, William B. Wachtel and Stella Lee

of counsel), and Grossman LLP, New York (Stanley M. Grossman and Judd B. Grossman of counsel), for appellants.

Holland & Knight LLP, New York (Michael Hess, Robert J. Burns, Benjamin R. Wilson and Stosh M. Silivos of counsel), for Castle Oil Corporation, respondent.

White & Case LLP, New York (David G. Hille, Heather K. McDevitt and Kim Haviv of counsel), for Hess Corporation, respondent.

SAXE, J.

In these two appeals, we reinstate the complaints, holding that when the proper standard of review for a CPLR 3211(a)(7) motion is applied, and the complaints' factual assertions, along with any inferences that can be drawn from them, are accepted as true, the complaints' allegations are sufficient to state a cause of action. Essentially, plaintiffs allege that the respective defendants provided their customers (plaintiffs) with inferior, adulterated heating oil, i.e. that the fuel oil that was delivered to them contained oils of lesser value mixed into the ordered grade of fuel oil, so that the delivered product did not meet the standards of the parties' contracts. These assertions suffice to allege breaches of contract and of UCC warranties.

The Two Actions

The impetus for these putative class actions was an investigation initiated by the law firm of Wachtel Masyr & Missry in 2011, before it contacted or was retained by plaintiffs in these cases. The firm undertook an independent investigation when it learned about a criminal investigation being conducted by the New York District Attorney's office regarding claimed misconduct in the fuel oil industry in New York.[1]

[1] State and federal authorities were also involved in investigation of the heating oil industry.

As detailed in an affidavit by private investigator Anthony Valenti that was provided to Supreme Court in the context of an earlier injunction motion, in October 2011, the law firm hired the investigation firm of Stroz Friedberg, LLC, "in connection with an ongoing investigation into fraud and misconduct in the retail heating oil business in the New York metropolitan area." In regard to the claim against defendant Hess, Valenti stated that beginning in December 2011 and continuing intermittently for a period of months, he supervised surveillance of an oil facility in Astoria, during which members of his surveillance team observed and recorded the loading of what plaintiffs term "waste oil"[2] onto trucks that were then loaded with No. 4 and No. 6 fuel oil at a Hess terminal, resulting in the delivery of a blended oil product to customers. As to the claims against defendant Castle Oil, Valenti stated that in November 2012, he arranged for a sample of No. 4 fuel oil delivered by Castle to a Manhattan building owned by plaintiff BMW Group LLC to be tested by a laboratory, and the test demonstrated that the oil did not

[2] The Hess complaint supplies the definition of "waste oil" found in Rules of the New York State Department of Environmental Conservation (6 NYCRR) § 225-2.2(b)(11): "Used and/or reprocessed engine lubricating oil and/or any other used oil, including but not limited to, fuel oil, engine oil, gear oil, cutting oil, transmission fluid, hydraulic fluid, dielectric fluid, oil storage tank residue, animal oil and vegetable oil, which has not subsequently been re-refined."

conform to the specifications for No. 4 fuel oil.

Both actions were commenced on March 13, 2013, immediately after governmental investigations culminated in a raid of five businesses, not involving defendants here. In the action brought against Castle Oil (appeal 16138), the five named plaintiffs are New York limited liability companies, each of which owns and operates a residential apartment building or a commercial building in New York. Suing on their own behalf and on behalf of a class of Castle Oil customers, they allege that during the four previous years they ordered from defendant Castle either No. 4 fuel oil or No. 6 fuel oil, and paid the retail price for that oil, but that the product Castle delivered was a mixture of those grades of fuel oil and waste oil or other types of inferior oil.

In the action against Hess (appeal 16139), plaintiffs Mid Island L.P. and Carnegie Park Associates, L.P. own and manage residential and commercial buildings in the New York metropolitan area whose heating systems are designed to burn either No. 4 or No. 6 fuel oil. Suing on their own behalf and on behalf of a class of Hess fuel oil customers, they allege that they contracted with Hess for the purchase of No. 4 and No. 6 fuel oil at various times between 2009 and 2013, but received a blend containing waste oil. Plaintiffs state that they were the victims of a scheme perpetrated by Hess's independent

transportation companies, which skimmed a percentage of the pure No. 4 and No. 6 fuel oil that they picked up from Hess, and replaced it with waste oil, which they then delivered to customers.

The Underlying Dismissal Motions

Following earlier motions and re-pleaded complaints, Hess and Castle each moved to dismiss the complaint against it, pursuant to CPLR 3211(a)(7). The motion court granted those motions; in both cases, while it declined to dismiss based on grounds of untimely notice pursuant to UCC 2-607(3)(a), it agreed with defendants that the complaints, while alleging that a blended fuel oil was delivered to plaintiffs, did not allege that any injury was caused to them by the use or the burning of this blended oil. The court reasoned that the claim that the delivered oil was less valuable than the product plaintiffs paid for was not sufficient to state a cause of action, relying on the proposition that a claim of economic damages based on nonconforming goods is insufficient in the absence of any demonstrable ill effect or negative impact on the product's performance or utility.

Discussion

The issue is whether, as the motion court concluded, plaintiffs' claims amount to merely "theoretical nonconformities"

that do not justify a claim for breach of warranty or breach of contract because they did not cause economic loss.

The so-called "tendency to fail" or "no injury" latent defect cases on which the motion court relied are inapposite. Actions alleging latent design defects where no accident had been caused by the alleged defect, and no property damage or personal injury occurred, are in essence products liability cases (*see e.g. Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002], *lv denied* 99 NY2d 502 [2002]; *Feinstein v Firestone Tire and Rubber Co.*, 535 F Supp 595 [SD NY 1982]). Their core allegation is essentially that the defendant produced or sold a defective product and/or failed to warn of the product's dangers. Here, however, the claim is "rooted in basic contract law" (*see Coghlan v Wellcraft Marine Corp.*, 240 F3d 449, 455 n 4 [5th Cir 2001]). In *Coghlan*, the plaintiffs purchased a recreational fishing boat that they were told was all-fiberglass construction, which was superior to their wood-fiberglass hybrid counterparts. The Court explained: "The wrongful act in a no-injury products suit is . . . the placing of a dangerous/ defective product in the stream of commerce," whereas "the wrongful act alleged by the [Coghlans] is [the defendant's] failure to uphold its end of their bargain and to deliver what was promised" (*id.*).

We perceive no valid basis for the distinction drawn by the

motion court, between the sale of fishing boats or olive oil and the sale of heating oil. Even if the purchaser does not qualify as a "consumer" for purposes of consumer protection laws, if the goods that are delivered do not conform to the goods contemplated by the sale contract, the purchaser has a cause of action under the Uniform Commercial Code.

An issue is raised as to whether plaintiffs successfully alleged that the delivered goods were nonconforming.

Both sides cite and discuss regulatory standards concerning heating oil, beginning with the Administrative Code of the City of New York, which defines "heating oil" as "oil refined for the purpose of use as a fuel for combustion in a heating system and that meets the specifications of the American Society for Testing and Materials designation D 396-09a or other specifications as determined by the commissioner" (*id.* § 24-168.1[6]). The applicable American Society of Testing and Materials (ASTM) specifications for fuel oil, contained in the record, establish detailed requirements for the different grades of oil, using such categories as minimum flash point temperature, viscosity, density, and maximum percentages of ash and sulfur.

Plaintiffs essentially allege that, consistent with the ASTM specifications, as well as common commercial usage, and pursuant to the UCC, customers purchasing goods described as No. 4 and No.

6 fuel oil are entitled to presume that they are receiving 100% fuel oil of the specified grade, and not a product consisting of a blend of No. 4 or No. 6 fuel oil with some other types of oil that do not meet the criteria of those ASTM specifications.

More specifically, plaintiffs in the Castle Oil matter allege that "Castle intentionally adulterates its fuel oil products by using other, cheaper oils (primarily used motor and lubricating oil) as filler, resulting in an inferior blended petroleum product." They explain that lubricating oil and fuel oil are different chemical substances, and that lubricating oils are designed with a higher boiling point than fuel oil and do not burn efficiently at temperatures typical in non-industrial heating systems. Additionally, because lubricating oils contain chemical additives not found in fuel oil, burning them in heating systems such as those in plaintiffs' buildings will tend to produce more soot and particulate matter pollution, reducing the efficiency of the heating system and creating an increased risk of fire. They also assert that while regulations permit used lubricating oil to be re-refined and used as fuel in high-temperature industrial settings, the used lubricating oil purchased by Castle to blend with its fuel oil was never refined for use as fuel.

Plaintiffs in the Hess matter assert that Hess's

transportation companies mixed the Hess fuel oil with 15-25% "waste oil" as that term is defined in the Rules of the New York State Department of Environmental Conservation (6 NYCRR) § 225-2.2(b)(11): "Used and/or reprocessed engine lubricating oil and/or any other used oil, including but not limited to, fuel oil, engine oil, gear oil, cutting oil, transmission fluid, hydraulic fluid, dielectric fluid, oil storage tank residue, animal oil and vegetable oil, which has not subsequently been re-refined." They also assert that the waste oil contaminants impair the performance of the heating systems into which they are introduced, and that fuel oil adulterated with waste oil has a lower heat content than No. 4 and No. 6 fuel oil, so that they (the customers) needed to purchase more oil than they would have if they had received 100% fuel oil.

In support of its position, Castle explains that it blends its fuel using petroleum products called "cutter stock," which its suppliers warrant meets the requirements of applicable federal rules. It protests that it made no express warranty that its No. 4 or No. 6 fuel oil would contain only pure fuel oil, and

that the governing regulatory regime expressly authorizes the use of "on-specification used oil"[3] as heating fuel. It concludes that in view of this authorization, plaintiffs cannot bring a cognizable claim that Castle failed to deliver no. 4 and no. 6 fuel oil as those products are defined in the applicable ASTM standards.

Initially, any policy of the state or federal government allowing or encouraging the use of certain forms of used oil for fuel (*see e.g.* 42 USC §§ 6901, 6935[a], 6903[37]; 40 CFR 279.1 *et seq.*; ECL 23-2301, 23-2303) does not necessarily or automatically justify its use for purposes of the parties' contracts, and does not provide a basis for dismissal of these complaints. Of course, at this pleading stage we cannot and need not determine the chemical composition of what Castle delivered to fulfill orders for No. 4 and No. 6 fuel oil, or whether the products plaintiffs received conformed to the specifications for those grades of fuel oil. Moreover, the absence in the amended complaint in the Hess action of a specific allegation regarding the exact nature and characteristics of the "waste oil" allegedly mixed with Hess's pure No. 4 and No. 6 fuel oil is not fatal at

[3] The term "on specification" is not used in the complaint, or in any evidentiary materials submitted by Castle; Castle seems to employ the term to support its position that blended oil is permitted, as long as the added oil is "on specification."

this juncture; it is a fair inference that the substitution of less valuable filler for 15-25% of the pure oil would reduce the quality, and the value, of the delivered oil.

Under UCC 2-714(2), the measure of damages for breach of warranty is the difference between the value of the goods delivered and the value of the goods warranted (*Belfont Sales Corp. v Gruen Indus.*, 112 AD2d 96 [1st Dept 1985]; *B. Milligan Contr. v Mancini Assoc.*, 174 AD2d 136, 139 [3d Dept 1992]; *City of New York v Pullman Inc.*, 662 F2d 910, 916 [2d Cir 1981], *cert denied* 454 US 1164 [1982]). Since we must infer from the complaint that plaintiffs received nonconforming oil deliveries of lesser value than those they contracted and paid for, causes of action for breach of contract and breach of warranty — including plaintiffs' damages — are stated in each action.

Defendants' alternative arguments for dismissal are similarly meritless. In particular, the question of whether plaintiffs gave timely notice of the alleged nonconformity presents a question of fact (*see New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 178 [1st Dept 2006]).

Accordingly, the orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 11, 2014, which granted defendant Hess Corporation's motion in appeal

16139 and defendant Castle Oil Corporation's motion in appeal 16138 to dismiss the complaint, should be reversed, on the law, with costs, and the motions denied.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2016

CLERK